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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MICHAEL RODRIGUEZ, Plaintiff and Appellant, v. JURUPA UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.	E046162 (Super.Ct.No. RIC488865) OPINION

APPEAL from the Superior Court of Riverside County. Paulette D. Barkley, Temporary Judge,* and Mac R. Fisher, Judge. Affirmed.

Ackerman, Cowles & Associates, Richard D. Ackerman and Michael W. Sands, Jr. for Plaintiff and Appellant.

Thompson & Colegate, Susan Knock Brennecke and Michael J. Marlatt for Defendant and Respondent Jurupa Unified School District.

* Pursuant to California Constitution, article VI, section 21.

Fagen Friedman & Fulfrost, Christopher D. Keeler and Leslie A. Reed for Defendants and Respondents Elliott Duchon and Carl Harris.

I. INTRODUCTION

Plaintiff Michael Rodriguez is a member of the Board of Education (the Board) of defendant Jurupa Unified School District (JUSD). He sued JUSD, JUSD's superintendent, Elliott Duchon, and the president of the Board, Carl Harris, alleging causes of action arising from the Board's investigation into allegations of sexual harassment and the Board's decision to publicly censure him. Rodriguez alleged that defendants' actions violated his federal and state constitutional rights to due process and equal protection. He also alleged that certain biblical references made by Harris in connection with the censure violated the establishment clauses of the state and federal Constitutions. He sought declaratory and injunctive relief, a writ of mandate, and damages pursuant to Title 42 United States Code section 1983 (§ 1983).

JUSD filed a motion to strike Rodriguez's complaint as a strategic lawsuit against public participation, commonly referred to as an anti-SLAPP motion, pursuant to Code of Civil Procedure section 425.16. The motion was based principally on the grounds that JUSD is immune from suit under the Eleventh Amendment to the federal Constitution and that Rodriguez does not have standing to pursue his declaratory relief claim. Subsequently, Harris and Duchon jointly filed an anti-SLAPP motion to strike the complaint or, in the alternative, strike the fourth and fifth causes of action for violation of the state and federal establishment clauses. The trial court granted JUSD's motion as to

the entire complaint and granted Harris and Duchon's motion as to the establishment clause claims only. Rodriguez appealed.

We agree with the trial court that defendants made a prima facie showing that the acts underlying Rodriguez's causes of action constituted protected activity for purposes of the anti-SLAPP statute. Defendants thus satisfied the first of two prongs for prevailing on their motions. We also agree with the trial court that Rodriguez does not have standing to pursue his action for declaratory relief and has failed to establish a violation of the establishment clauses of our state and federal Constitutions. Although we disagree with JUSD and the trial court that the Eleventh Amendment bars Rodriguez's constitutional claims, we conclude that Rodriguez has failed to satisfy his burden of establishing a probability of prevailing on the claims. Accordingly, we will affirm the court's rulings.

II. FACTUAL SUMMARY AND PROCEDURAL HISTORY

A. *Factual Summary*[1]

Between December 2005 and July 2006, Rodriguez allegedly engaged in inappropriate workplace conduct, including making sexually-charged comments, inappropriate physical contact, and threats against JUSD employees. In response to the allegations, JUSD hired the law firm of Gresham Savage Nolan & Tilden (the investigators) to investigate the employees' claims. On September 27, 2006, the

[1] Our factual summary is based upon evidence submitted in support of and in opposition to the anti-SLAPP motions. We do not rely on evidence to which an objection was sustained.

investigators informed Rodriguez of the inquiry and offered him an opportunity to respond to the allegations. He was told he could meet with an investigator on October 2, 2006, or provide a response to the allegations in writing, or both.

After learning of the investigation, Rodriguez retained counsel to represent him. Through counsel, Rodriguez informed the investigators that he was in the midst of a contested school board election and asked the investigators to delay the investigation. He informed them he would cooperate with the inquiry "at the appropriate time." Rodriguez added that he believed the investigation was instigated by Duchon to punish Rodriguez for voting against Duchon's contract and that he had suffered damage to his reputation as a result of rumors about the investigation that caused the loss of two key endorsements in the school board election.

Through its legal counsel, JUSD acknowledged Rodriguez's retention of counsel and agreed to pay Rodriguez's legal costs associated with the investigation. JUSD requested a copy of the fee agreement between Rodriguez and his counsel.

Approximately one week later, after reviewing the fee agreement, JUSD told Rodriguez the agreement was unclear as to the scope of the engagement between Rodriguez and the attorney and informed Rodriguez that JUSD would only pay for "legal fees and costs related to legal representation on matters directly related to [JUSD]'s ongoing internal investigation of the sexual harassment claims . . . ."

On October 6, 2006, a lawyer with the investigators informed Rodriguez that although he appreciated "Rodriguez's concerns about the investigation proceeding so

close in time to a school board election, . . . the Board of Directors . . . has a duty by law and policy to investigate all allegations of workplace discrimination or harassment that are brought to its attention. Politics cannot require an employer to postpone or delay its legal duties." The lawyer acknowledged that Rodriguez was not obligated to cooperate with the investigation, but urged him to make himself available for an interview or to provide his written responses to the allegations. He offered the dates of October 9 or 10, 2006, to meet with Rodriguez. The lawyer acknowledged Rodriguez's request for a copy of the investigator's file, but stated that they generally do not release such information to individuals who are subjects of the investigation.

On October 8, 2006, Rodriguez again told the investigators that he would only meet "at the appropriate time," and added that such a time would necessarily not be until after the election. Rodriguez reiterated his belief that the investigation was timed to hurt him in the election, noted the delay between the alleged acts and the beginning of the investigation, and once again asked for a delay, noting that he could not "imagine that a delay of less than a month [would] affect [the] investigation."

On October 12, 2006, Rodriguez informed the investigators that The Press-Enterprise intended to run a story on his alleged inappropriate acts. Rodriguez asked for assurances that the investigators maintain confidentiality.

On October 13, 2006, the investigators told Rodriguez they needed to proceed with the investigation and noted that very little time had elapsed between JUSD becoming aware of the alleged acts and the beginning of the investigation. The

investigators stated their understanding that Rodriguez was declining to participate in the investigation because of the upcoming election and would assume that he would generally deny all allegations. They also informed Rodriguez that they would make themselves available to him if he chose to cooperate after they concluded their investigation.

On October 20, 2006, Harris, as president of the Board, sent a letter to Rodriguez noting that the investigators had finished their inquiry and they had concluded that Rodriguez had unlawfully harassed at least two of the employees. Harris further noted that although Rodriguez had refused to cooperate with the investigation, the Board would consider allowing him to cooperate later. Finally, Harris asked Rodriguez to participate in sensitivity and sexual harassment training and an anger management program, and to recuse himself from all personnel matters involving certain employees who participated in the investigation.

On October 25, 2006, Rodriguez requested a copy of all information related to the investigation pursuant to the California Public Records Act. (Gov. Code, § 6250 et seq.) JUSD subsequently turned over certain documents responsive to the request, but withheld other documents based upon the attorney-client privilege and attorney work product doctrine.

On October 27, 2006, JUSD's lawyer informed Rodriguez's lawyer that the investigation was complete, and that JUSD would not pay for any charges that accrued after the receipt of the letter, or for any charges that were not directly related to the

investigation. JUSD's lawyer added: "Should Mr. Rodriguez choose to participate at a later date in the investigation, please contact me so that we can discuss legal representation at that time."

On November 1, 2006, Rodriguez's counsel told the investigators that Rodriguez would make himself available for an interview. The investigators responded by proposing the date of November 4, 2006, for the interview. Our record does not include any response to this proposal.

On November 21, 2006, JUSD's lawyer told Rodriguez's lawyer: "[I]t is imperative to promptly schedule a meeting between [JUSD] and Mr. Rodriguez (and their respective attorneys) to discuss the findings and implementation of [JUSD]'s directives. Without this meeting, the Board has determined that it may be necessary to make its findings and directives public so as to protect [JUSD] and its employees." Rodriguez's attorney responded with a promise to "get back to you as soon as I hear from Mr. Rodriguez." It does not appear from our record that Rodriguez's counsel responded further regarding the scheduling of a meeting or that JUSD ever interviewed Rodriguez in connection with the investigation. Rodriguez subsequently retained new counsel.

On January 2, 2007, JUSD published a meeting agenda that included consideration of a resolution to censure Rodriguez for "Unacceptable Conduct." The same day, Rodriguez, through his new counsel, asked JUSD to remove the resolution from the agenda and alleged that any attempt to censure Rodriguez would both violate Rodriguez's due process rights and defame Rodriguez's character.

The resolution was not taken off the agenda. Following extensive debate on the resolution—including a lengthy speech by Rodriguez—the Board voted three to two to censure Rodriguez. During the meeting, Harris first praised Rodriguez's intellect and said that admonishing Rodriguez did "not come easy." Later, he made the following statements: "I think it is important that we can't be distracted. There is a whole lot of discussion about a whole lot of other things other than what happened and what the censure is about. If you will allow me and please be understanding. I am sorry about this analogy that I am about to draw because it [is] a Christian Judeo analogy based in the Old Testament. The book of Genesis where Adam and Eve are in the garden and they have partaken of the forbidden fruit and they are expecting [D]eity to come and Lucifer is there with them and he says, 'Adam and Eve, hear the voice of Deity.' And they say they are coming. And Lucifer says, 'Look, you are naked. Run and hide or God will see your nakedness.' So what do they do? They run and hide. They take off and so Deity comes and says, 'Adam, where are you? Adam, where are you?' and then he said, 'I was hiding myself because I was naked.' And He said, 'Well, who told you you were naked?' The thing that Adam and Eve should have felt guilty about was eating the forbidden fruit. That is what they did that was wrong. But Lucifer made a tactical decision to make them feel guilty about being naked, which they weren't guilty of. That is the way that God left them. So, distraction has been a long series of events that has taken place from the beginning of time to now, this day. And I won't be distracted Ladies and Gentlemen, because that is not what this is about."

Following the censure, Harris removed Rodriguez from Board committee assignments. According to Rodriguez, this "effectively rendered [him] unable to carry out many of [his] constitutional duties as a [B]oard member." He further asserts he has been excluded from financial decisions about employee pay and benefits and from the hiring committee and "completely silenced by HARRIS and his supporters on the Board." Finally, he asserts various improprieties concerning meetings on January 22, 2008, and January 28, 2008, pertaining to decisions made concerning the defense of his lawsuit.

B. *Rodriguez's Complaint*

On January 2, 2008, Rodriguez filed suit against JUSD, Harris, Duchon, and unnamed defendants. We summarize the essential factual allegations as follows: Based upon false and defamatory allegations of sexual harassment against Rodriguez, JUSD (at the request of Harris and Duchon) commenced an investigation of Rodriguez; the investigation was not confidential, neutral, unbiased, or objective as required by the Board's policy; the investigators were hired to find sexual harassment and paid to produce a report that would conclude that Rodriguez did something wrong; JUSD agreed to pay for Rodriguez's attorney, but subsequently stopped paying for, and eventually fired, his attorney; JUSD's investigators refused to turn over evidence to Rodriguez's attorney and falsely claimed the investigation was complete on October 16, 2006; the investigation process did not comply with JUSD's policies regarding sexual harassment claims; Harris and Duchon caused the Board to consider a motion to censure Rodriguez;

during the meeting concerning the censure motion, Harris "engrafted various religious references from the Bible's Book of Genesis into his official action"; following the censure of Rodriguez, Harris removed him from all committee assignments, effectively rendering him unable to carry out his duties as a Board member; he has also been excluded from any decisions regarding employee pay and benefits; Harris and Duchon have kept information regarding hiring decisions from Rodriguez and have meetings in violation of the Ralph M. Brown Act (Brown Act) (Gov. Code, § 54950 et seq.); Harris and Duchon "appear to have orchestrated the systematic removal of Latino/Hispanic administrators from key positions within [JUSD]," and Rodriguez has complained about such actions; the sexual harassment investigation is retaliation for his comments regarding racial discrimination in hiring and employee retention policies; Duchon and Harris have created an atmosphere where minority and other employees fear for their job security and are afraid to speak out on issues that concern them; and Harris and Duchon are involved in an effort to recall Rodriguez and have unlawfully used JUSD resources for such efforts.

Rodriguez alleged six causes of action relevant here, styled as: (1) "Declaratory Relief" (against all defendants); (2) "Violation of Due Process Clause of the California Constitution" (against all defendants); (3) "Violation of 42 U.S.C.A. § 1983" (against all defendants); (4) "Violation of Federal Establishment Clause" (against Harris and JUSD);

(5) "California Establishment Clause" (against Harris and JUSD); and (6) "Violation of Equal Protection" (against all defendants). (Capitalization omitted.)[2]

Among other relief, Rodriguez seeks: unspecified injunctive relief; declaratory relief; costs and attorney fees; damages under § 1983; the appointment of a receiver, special master, or referee to prevent the waste of public funds; a writ of mandate "as may be appropriate to the facts of this case"; an order preventing the investigators or the law firm that represented JUSD during the investigation from representing JUSD in this litigation; an order precluding Harris and Duchon from participating in Board meetings concerning this litigation; and "other appropriate relief[.]"

C. *The Anti-SLAPP Motions*

On February 21, 2008, JUSD filed its anti-SLAPP motion. The motion was made pursuant to Code of Civil Procedure section 425.16 and on the ground that the complaint "was brought to chill the valid exercise of JUSD's rights of petition and free speech under the United States and California Constitutions in connection with public issues." The motion was based on the further grounds that: (1) the complaint is barred against JUSD "pursuant to the Eleventh Amendment to the United States Constitution"; (2) "the complaint fails to establish any statutory liability or authority under California law upon which [Rodriguez] is entitled to the [*sic*] relief"; and (3) the "claims for relief in the

[2] Rodriguez also alleges a cause of action for "Disclosure of Private Facts." This cause of action is asserted against unnamed defendants only.

interest of the public are barred by California law . . . because [Rodriguez] is a member of JUSD's board."

On March 5, 2008, Harris and Duchon filed their anti-SLAPP motion. They sought to strike the entire complaint "on the grounds that the allegations arise out of [Harris and Duchon's] furtherance of the exercise of their right to petition or free speech under the State and Federal Constitutions in connection with an issue of public interest, and it is not probable that [Rodriguez] will prevail on his causes of action." Alternatively, Harris and Duchon moved to strike the fourth and fifth causes of action, which alleged violations of the establishment clauses of the state and federal Constitutions.

Neither JUSD, Harris, nor Duchon submitted any evidence in support of the motions with their moving papers. In opposition to the motions, Rodriguez submitted documents and his declaration, which provide the primary sources for our factual summary.[3] JUSD submitted, along with its reply papers, a transcript of the January 2, 2007, JUSD board meeting.

On April 18, 2008, the trial court granted JUSD's motion. In its order, the court stated, first, that it found that "all claims against [JUSD] arise out of acts or statements by

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[3] In his declaration in opposition to the anti-SLAPP motions, Rodriguez stated that the facts set forth in his complaint "are true and correct . . . ." The trial court sustained JUSD's objection to this statement. The court also sustained objections to statements in Rodriguez's declaration concerning, among other matters, the alleged involvement of Harris and Duchon in a recall election directed against Rodriguez, alleged communications between JUSD's counsel and defendants, and alleged violations of the Brown Act.

JUSD through its officials in conjunction with the investigation of a JUSD employee's sexual harassment claim against [Rodriguez], including a January 2, 2007, meeting and resulting disciplinary measures adopted that impacted [Rodriguez]." Thus, the court explained, the claims were based upon actions that are protected under the anti-SLAPP statute. The court then considered whether Rodriguez demonstrated a probability that he would prevail on the claims. On this issue, the court found that Rodriguez "provided no admissible evidence refuting a conclusion that [JUSD]'s acts were taken in conjunction with legitimate legislative activity, and within the realm of official acts and proceedings. Based on the evidence submitted, the Court concludes that JUSD's acts and conduct are subject to Eleventh Amendment protection." The court further ruled that Rodriguez could not assert his "claims on behalf of the public interest" and that the evidence does not support "a claim for violation of the [e]stablishment [c]lause[.]" Finally, the court concluded the declaratory relief cause of action did not take the case outside the purview of the anti-SLAPP statute because the gravamen of the complaint "focuses on the investigation and resulting discipline."

The trial court granted Harris and Duchon's motion on April 30, 2008. In its ruling, the court noted that although the notice of motion states it is directed against the entire complaint, the arguments and analysis supporting the motion focus exclusively on the religious comments made by Harris. Therefore, the court treated the motion as a motion to strike only the claims based upon the establishment clauses of the state and federal Constitutions. As to these claims, the court granted the motion, explaining that

the "alleged conduct consists of a brief allegorical biblical reference made during the [January 2, 2007 JUSD] meeting. Such comments do not rise to the level of religious and governmental entanglement . . . ."[4]

III. ANALYSIS

A. *Anti-SLAPP Principles and Standard of Review*

The anti-SLAPP statute, Code of Civil Procedure section 425.16, provides, in part: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).) The word "person" as used in Code of Civil Procedure section 425.16, subdivision (b) includes government entities. (*Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1114.)

The statute was enacted "to prevent and deter 'lawsuits [referred to as SLAPP's] brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' [Citation.] Because these meritless

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[4] While this appeal was pending, Rodriguez filed a first amended complaint that omitted the establishment clause claims and was otherwise substantially similar to the original complaint. Harris and Duchon filed an anti-SLAPP motion to the first amended complaint, which the court granted. Rodriguez appealed from that ruling, to which we assigned our case No. E048562. We affirmed the court's ruling in that case in June 2010 in a nonpublished opinion. (*Rodriguez v. Harris* (June 7, 2010, E048562) [nonpub. opn.].)

lawsuits seek to deplete 'the defendant's energy' and drain 'his or her resources' [citation], the Legislature sought '"to prevent SLAPPs by ending them early and without great cost to the SLAPP target"' [citation]. [Code of Civil Procedure s]ection 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation. [Citation.] In doing so, [Code of Civil Procedure] section 425.16 seeks to limit the costs of defending against such a lawsuit. [Citation.]" (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.)

The statute establishes a "two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. [Citation.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in [Code of Civil Procedure] section 425.16, subdivision (e)' [citation]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citations.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; Code Civ. Proc., § 425.16, subd. (b)(1).)

"[I]n order to establish the requisite probability of prevailing [citation], the plaintiff need only have '"stated and substantiated a legally sufficient claim."' [Citations.] 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a

favorable judgment if the evidence submitted by the plaintiff is credited."' [Citations.] [¶] Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten, supra,* 29 Cal.4th at pp. 88-89.)

On appeal, we independently review the evidence supporting both prongs of the analysis. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999 [Fourth Dist., Div. Two].)

B. *First Prong: Defendants' Threshold Showing That Rodriguez's Claims Arose From Protected Activity*

"The preliminary inquiry in an action like that before us is to determine exactly what act of the defendant is being challenged by plaintiff. In doing so we review primarily the complaint, but also papers filed in opposition to the motion to the extent that they might give meaning to the words in the complaint." (*Dible v. Haight Ashbury Free Clinics, Inc.* (2009) 170 Cal.App.4th 843, 849; see Code Civ. Proc., § 425.16, subd. (b)(2).) The reach of the anti-SLAPP statute is to be "construed broadly." (Code Civ. Proc., § 425.16, subd. (a).) "[A] plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and unprotected activity under the label of one 'cause of action.'" (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308, fn. omitted.) "The 'principal thrust or gravamen' of the claim determines whether [Code of Civil Procedure] section 425.16

applies. [Citation.] [¶] . . . where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to [Code of Civil Procedure] section 425.16 unless the protected conduct is 'merely incidental' to the unprotected conduct. [Citations.]" (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103; see *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672.)

The allegations set forth in Rodriguez's complaint and the evidence submitted in connection with the motions to strike are summarized above. In essence, he asserts defendants violated his federal and state constitutional rights to due process and equal protection, as well as unspecified "First Amendment" rights, by the manner in which the investigation of his alleged sexual harassment of JUSD employees was conducted and by the resulting public censure of him by the Board. In addition, he asserts that Harris's references to the book of Genesis in connection with the censure motion violated the establishment clauses of the federal and state Constitutions.

Code of Civil Procedure section 425.16 identifies four protected classes of speech and action: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest;

(4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e).) In the first and second of these categories, "the statute requires simply *any* writing or statement made in, or in connection with an issue under consideration or review by, the specified proceeding or body. . . . Under the plain terms of the statute it is the context or setting itself that make the issue a public issue: all that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116.)

The gravamen or basic thrust of Rodriguez's causes of action is that the public censure and the related investigation violated various constitutional rights. Many of the actions that give rise to Rodriguez's suit took place at public board meetings; those that did not occurred in the course of the investigation that led to this public debate and Rodriguez's public censure. As such, his claims are easily encompassed within the first two statutory categories of protected activity. As noted in *Briggs*, any writing or statement related to an issue being reviewed by an official proceeding is covered under these first two clauses. In addition, the statements expressed during the public meeting itself, including Harris's biblical references, are clearly statements covered by the third category because they were "made in a place open to the public or a public forum in connection with an issue of public interest[.]" (Code Civ. Proc., § 425.16, subd. (e).)

Accordingly, we agree with the trial court that the claims arise out of protected activity under the anti-SLAPP statute.

C. *Second Prong: Probability of Prevailing on the Merits*

1. Declaratory Relief and Standing to Assert Matters in the Public Interest

JUSD asserted below that Rodriguez does not have standing to litigate matters in the public interest based on *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793 (*Carsten*) and *Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242 (*Holbrook*). JUSD directed this argument, as it does on appeal, at Rodriguez's first cause of action for declaratory relief. We agree with JUSD that Rodriguez lacks standing to sue for declaratory relief concerning the matters raised in his first cause of action.

In *Carsten*, plaintiff Arlene Carsten was one of five members of the Psychology Examining Committee of the Board of Medical Quality Assurance (PEC). (*Carsten, supra,* 27 Cal.3d at p. 795.) The PEC has the statutory obligation to insure that only qualified individuals practice psychology in California. (*Ibid.*) Over Carsten's dissenting vote, a majority of the PEC voted to use a certain examination for a portion of the test administered to applicants. (*Id.* at p. 796.) Carsten asserted that the new exam was contrary to a statutory requirement and petitioned for a writ of mandate to compel the PEC to comply with the statute. (*Id.* at pp. 795-796.) The trial court sustained the PEC's demurrer and the Supreme Court affirmed.

The Supreme Court explained that, because Carsten was not seeking a psychology license or in danger of losing a license as a result of the new rule, she was "not a

beneficially interested person within the meaning of the statute" authorizing writs of mandate. (*Carsten, supra,* 27 Cal.3d at p. 797; see Code Civ. Proc., § 1086.) The court also rejected Carsten's argument that she had standing as a taxpayer. Although the court acknowledged that "there are circumstances under which a citizen-taxpayer may compel a governmental instrumentality to comply with its constitutional or statutory duty" (*Carsten, supra,* at p. 797), it held "that a board member is not a citizen-taxpayer for the purpose of having standing to sue the very board on which she sits" (*id.* at p. 801). The court's holding was based on policy grounds: "Unquestionably the ready availability of court litigation will be disruptive to the administrative process and antithetical to its underlying purpose of providing expeditious disposition of problems in a specialized field without recourse to the judiciary. Board members will be compelled to testify against each other, to attack members with conflicting views and justify their own positions taken in administrative hearings, and to reveal internal discussions and deliberations. Litigation—even the threat of litigation—is certain to affect the working relationship among board members. In addition, the defense of lawsuits brought by dissident board members—and such suits would undoubtedly be frequent—will severely tax the limited budgetary resources of most public agencies. [¶] From the vantage point of the judiciary such litigation has ominous aspects. It is purely and simply duplicative, a rerun of the administrative proceedings in a second, more formal forum. The dissident board member, having failed to persuade her four colleagues to her viewpoint, now has to persuade merely one judge. The number of such suits emanating from members on city,

county, special district and state boards, will add significantly to court calendar congestion." (*Id.* at p. 799.)

In *Holbrook*, two members of the Santa Monica City Council filed a petition for writ of mandate and complaint for declaratory relief claiming that the city council's meetings violated certain constitutional and statutory provisions. (*Holbrook, supra,* 144 Cal.App.4th at p. 1245.) They alleged that meetings frequently ran late into the night and provided for public comment as the final order of business, thus forcing the public to wait so long and stay so late to address the city council that the public was deprived of its fundamental right to address their local representatives. (*Id.* at pp. 1245-1246.) They sought a writ of mandate and injunction compelling the council to end its meeting by 11:00 p.m. (*Id.* at p. 1246.) The City of Santa Monica responded by filing a demurrer and an anti-SLAPP motion, asserting that the plaintiffs did not have standing to sue. (*Ibid.*) The trial court sustained the demurrer and granted the motion. (*Id.* at p. 1245.) The Court of Appeal affirmed.

The Court of Appeal began by noting that, under *Carsten*, members of a public entity forfeit their citizen-taxpayer standing right. (*Holbrook, supra,* 144 Cal.App.4th at p. 1251.) The court then addressed whether the plaintiffs had a beneficial interest in the matter. The plaintiffs asserted that they had "'a beneficial interest in the competent exercise of their rights and duties as public officials and in a safe and healthy workplace.'" (*Ibid.*) Working 20-hour days on meeting days, they argued, "creates an unhealthy and unsafe working environment," hampering the performance of their official

duties. (*Id.* at pp. 1251-1252.) The court rejected the argument, explaining that the plaintiffs failed to "demonstrate any beneficial interest on [their] part . . . that differs from the general interest of all citizens in the effective and legal operation of their governmental entities." (*Id.* at p. 1253.) The court concluded: "As no beneficial interest in the workings of a government entity is conferred by serving on that entity, [plaintiffs] have not established any beneficial interest sufficient to confer standing." (*Id.* at p. 1254, fn. omitted.) The court further held that the plaintiffs were not interested persons for purposes of seeking declaratory relief under the Brown Act. (*Holbrook, supra,* at pp. 1255-1259.) Relying extensively on the policy reasons set forth in *Carsten,* the court agreed "that citizen standing is not a weapon to put in the hands of dissatisfied public officials seeking a new venue for advocacy; that the courts must not become a body to hear what would amount to legislative appeals; and that permitting this kind of citizen lawsuit would be incompatible with the officials' acceptance of public office and detrimental to the separation of powers." (*Holbrook, supra,* at p. 1259.)

We agree with JUSD that these authorities preclude Rodriguez's declaratory relief claims. Declaratory relief requires "an actual controversy that is currently active . . . and both standing and ripeness are appropriate criteria in that determination." (*Otay Land Co. v. Royal Indemnity Co.* (2008) 169 Cal.App.4th 556, 563.) Here, Rodriguez alleges 18 separate controversies he contends require judicial determination. Although some of these alleged controversies are phrased in terms of determining whether *his* constitutional rights were violated by JUSD, the gist of the claims are that defendants acted unlawfully

with respect to the handling of the sexual harassment investigation, the support of a recall election against him, and their treatment of him in Board proceedings. He seeks, for example, declarations as to whether defendants: "have the right to expend and/or waste public funds in supporting the present recall election against [him]"; "have the right to continually prevent [him] from participating in JUSD Board Committee proceedings and processes as a punishment for a 'censure' of [him]"; "conducted a fair and neutral process in investigating the allegations of sexual harassment against [him]"; "must provide a neutral hearing process in the future with respect to the allegations made against [him]"; "violated Due Process principles when they retained and fired counsel for [him]"; and "are currently engaged in a systematic pattern of discrimination against Latino Board members and employees of [JUSD]." Such alleged controversies are, in essence, issues that concern "the interest of the public in the orderly and competent exercise of government, not a personal interest distinct from that of the public." (*Holbrook*, *supra*, 144 Cal.App.4th at p. 1252.) Indeed, Rodriguez expressly alleges that the "resolution of these controversies is in the public interest within the meaning of the law." Although he further alleges he has been damaged as a result, we believe that he has not alleged a sufficient personal interest in the alleged controversies to support the actual controversy requirement necessary to state a cause of action for declaratory relief.[5]

[5] To the extent that the judicial declarations of alleged constitutional violations sought by Rodriguez are matters of distinct personal interest and therefore not controlled by *Carsten* and *Holbrook*, the claims of such violations are legally insufficient for the reasons set forth in our discussion of Rodriguez's constitutional claims, *post*.

2. Due Process Under the California Constitution

Rodriguez alleges that defendants' violated his right to due process under the California Constitution. He does not specify the particular conduct giving rise to the deprivation of due process, referring only to defendants' "conduct as described above [in the complaint]."[6]

In its anti-SLAPP motion, JUSD asserted the action was barred by the Eleventh Amendment to the federal Constitution. We reject this argument.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." (U.S. Const., 11th Amend.) The Amendment is an explicit limitation on the "judicial power of the United States"—i.e., *federal courts*—to hear suits against a nonconsenting state. (*Pennhurst State School. & Hosp. v. Halderman* (1984) 465 U.S. 89, 119-120; *Nevada v. Hall* (1979) 440 U.S. 410, 420; *Missouri v. Fiske* (1933) 290 U.S. 18, 25-26.) However, the amendment does not apply to suits filed in state court. (See *Hilton v. South Carolina Public Railways Com'n* (1991) 502 U.S. 197, 204; *Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 63-64; *Maine v. Thiboutot* (1980) 448 U.S. 1, 9, fn. 7.) Rodriguez's lawsuit was filed in state court. Therefore, the Eleventh

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6 Although California courts do not recognize a cause of action to recover monetary damages for a violation of California's due process clause, a cause of action alleging such a violation is permitted to obtain a writ of mandate or declaratory or injunctive relief. (*Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 326, 329.)

Amendment is not a bar to Rodriguez's cause of action for violation of our state Constitution's right to due process.

Although JUSD's Eleventh Amendment argument is without merit, this does not end the matter. Under the anti-SLAPP statute, once defendants have satisfied their burden as to the protected activity prong, "the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.]" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) It is not enough "merely to counter defendant's affirmative defenses." (*Balzaga v. Fox News Network, LLC.* (2009) 173 Cal.App.4th 1325, 1337) "Rather than requiring the *defendant* to defeat the plaintiff's pleading by showing it is legally or factually meritless, the motion requires the *plaintiff* to demonstrate that he possesses a legally sufficient claim which is 'substantiated,' that is, supported by competent, admissible evidence." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719.)

Rodriguez bases his due process claim on the argument that his "property right in his good name, reputation and honor" was placed at stake by the sexual harassment investigation, thereby triggering the due process rights to notice and an opportunity to be heard. He relies on the United States Supreme Court's decision in *Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564 (*Roth*). In that case, an untenured professor of a state university was told he would not be rehired for the next academic year. (*Id.* at p. 566.) He was not given a reason for the decision or an opportunity to challenge it at a

hearing. (*Id.* at p. 568.) The professor believed the decision was made to punish him for making statements critical of the university administration and therefore violated his right to freedom of speech. (*Ibid.*) He sued the Board of Regents of the university claiming that the failure to give him notice of a reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law. (*Id.* at p. 569.) In rejecting the claim, the Supreme Court explained: "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' [Citations.] In such a case, due process would accord an opportunity to refute the charge before University officials." (*Id.* at p. 573, fn. omitted.) The court noted that the "purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons." (*Id.* at p. 573, fn. 12.) The court concluded that such a hearing was not required in the case before it because "there is no suggestion whatever that the respondent's 'good name, reputation, honor, or integrity' is at stake." (*Id.* at p. 573.)

Based on *Roth*, Rodriguez asserts he was deprived of his due process right to notice and "an opportunity to refute the charge . . . that he was guilty of sexual harassment." According to Rodriguez, he did not get this opportunity because JUSD "unilaterally and without notice or prior hearing terminated [his] defense counsel mid way through the investigation . . . ."[7] He further contends that due process required the investigators "to turn over essential investigative materials" to him and that he was entitled to "a list of the witnesses against him in the proceedings." The claim is without merit.

When procedural due process is required, the person whose liberty or property is subject to deprivation by the government is entitled to "notice and opportunity for hearing appropriate to the nature of the case." (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313.) "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." (*Boddie v. Connecticut* (1971) 401 U.S. 371, 378, fn. omitted; accord, *Lackner v. St. Joseph Convalescent Hospital, Inc.* (1980) 106 Cal.App.3d 542, 557-558.) As our state Supreme Court has explained: "In determining applicable due process safeguards, it must be remembered that 'due process is flexible

[7] Rodriguez characterizes JUSD's decision to discontinue paying for his counsel as a decision to terminate his counsel. The evidence submitted, however, indicates that Rodriguez hired his own counsel, that JUSD subsequently agreed to pay for the investigation-related expenses of the attorney, then later discontinued the payments once it deemed the investigation complete. The evidence does not, therefore, support Rodriguez's view that JUSD terminated his counsel.

and calls for such procedural protections as the particular situation demands.' [Citation.]" (*People v. Ramirez* (1979) 25 Cal.3d 260, 268.)

Here, Rodriguez was not accused of a crime or terminated from his employment. The proceedings were concerned with the adoption of a resolution to censure Rodriguez for "unacceptable conduct." At the Board meeting where the resolution was discussed, Harris, as president of the Board, explained that adoption of the "resolution is not a formal legal finding and its adoption would not diminish Mr. Rodriguez's rights as a Trustee." Under these circumstances, Rodriguez was, at most, entitled to notice of the censure resolution and an opportunity to refute the allegations and clear his name. (See *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1807.) It is clear from the evidence that he was given such notice and opportunity. He was informed of the allegations, offered multiple opportunities to meet with JUSD's investigators with counsel present, given notice of the meeting at which the Board would consider the resolution, and provided ample opportunity to be heard on the matter at the Board meeting prior to the vote on the resolution. There is nothing in *Roth* or any other authority cited by Rodriguez that supports his assertion that due process entitled him to counsel at JUSD's expense, to the investigators' materials, or a "list of the witnesses against him."

Rodriguez also contends the use of investigators who are paid by JUSD violates due process under *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 (*Haas*). We disagree. In *Haas*, the California Supreme Court held that a county government

practice of hiring temporary administrative hearing officers to make adjudicative decisions violated due process. (*Id.* at pp. 1020, 1037.) The court explained that unilaterally selecting and paying such officers on an ad hoc basis when "the officer's income from future adjudicative work depends entirely on the government's goodwill" created a pecuniary interest requiring disqualification. (*Id.* at p. 1024.) The court concluded: "The requirements of due process are flexible, especially where administrative procedure is concerned, but they are strict in condemning the risk of bias that arises when an adjudicator's future income from judging depends on the goodwill of frequent litigants who pay the adjudicator's fee." (*Id.* at p. 1037.)

Hass is easily distinguished. The potentially biased administrative hearing officers in *Haas* were adjudicators. Due process, the court stated, "requires fair adjudicators in courts and administrative tribunals alike." (*Haas, supra,* 27 Cal.4th at p. 1024, fn. omitted.) The investigators in this case were just that: investigators. There is nothing in the record to suggest the investigators were hired to act or acted as adjudicative decision makers in any way. At the conclusion of their investigation, the investigators provided the Board with "an oral report," after which the Board "determined that there is evidence that [Rodriguez's] actions constituted unlawful gender-based harassment against at least two of the complainants . . . ." Nothing in *Haas* suggests that due process precludes a government entity from hiring a third party to conduct an investigation into allegations of sexual harassment.

Under the circumstances appearing from our record, therefore, Rodriguez has not satisfied his burden of establishing a probability of success on his due process claim.

3. Establishment Clause Claims

The trial court granted both JUSD's motion and Harris's motion to strike Rodriguez's federal and state establishment clause causes of action based on its application of a *Lemon*[8] test. We agree with the trial court's rulings.

The establishment clause of the federal Constitution states that "Congress shall make no law respecting an establishment of religion[.]" (U.S. Const., 1st Amend.) The Fourteenth Amendment applies the federal Constitution to California. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." (U.S. Const., 14th Amend., § 1.) This application extends to the establishment clause. "The Religion Clauses apply to the States by incorporation into the Fourteenth Amendment." (*Elk Grove Unified Sch. Dist. v. Newdow* (2004) 542 U.S. 1, 8, fn. 4.)

The establishment clause of the California Constitution similarly states that "[t]he Legislature shall make no law respecting an establishment of religion." (Cal. Const., art. I, § 4.) The California Supreme Court has held that this provision shall not be construed more broadly than the federal establishment clause. "Because the California Constitution is a document of independent force, the rights it guarantees are not necessarily coextensive with those protected by the federal Constitution. [Citations.] We do not

[8] *Lemon v. Kurtzman* (1971) 403 U.S. 602 (*Lemon*).

believe, however, that the protection against the establishment of religion embedded in the California Constitution creates broader protections than those of the First Amendment. We are satisfied that the California concept of a 'law respecting an establishment of religion' [citation] coincides with the intent and purpose of the First Amendment establishment clause." (*East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, 718.) Thus, our federal establishment clause analysis informs our state establishment clause analysis.

Courts use a three-part test to determine whether a governmental practice violates the federal establishment clause. "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [citation]; finally, the statute must not foster 'an excessive government entanglement with religion.'" (*Lemon, supra,* 403 U.S. at pp. 612-613.)

Here, even if we assume that a short biblical reference made in the course of a government official's public speech constitutes a statute or governmental act under the meaning of *Lemon* and its progeny, Harris's remarks—coupled with the context in which he made them—do not run afoul of any prong of the *Lemon* test.

First, the censure speech as a whole had the secular legislative purpose of disciplining Rodriguez. Although we do not foreclose the possibility that a censure resolution could have a nonsecular purpose, nothing in the record before us—including

Rodriguez's unwarranted insinuations regarding Harris's religious affiliation—leads us to conclude that the censure resolution had such a purpose.

Focusing on the narrower issue of the biblical allusion, we believe that this too had a secular primary purpose, inasmuch as Harris was attempting to convey to the audience the conflicted emotions that he felt in censuring Rodriguez. Taken in context, Harris both complimented Rodriguez's sharp intellect and apologized to the audience before he made the allusion. These acts hardly suggest to us that Harris intended to promote his religion.

Second, Rodriguez gives us no basis to conclude that the resolution had any actual effect other than his public censure. In the absence of such a showing, we do not believe that an overly secular disciplinary measure can be thought to advance or inhibit religion. Focusing on the narrower issue of the allusion, Rodriguez likewise provides us with no basis to conclude that the primary effect of the allusion was to promote or inhibit religion.

Finally, even assuming that the resolution or the allusion met the first two prongs of this analysis, Rodriguez gives us no basis to conclude that Harris's passing reference to the Bible excessively entangled church and state. We thus conclude that neither the resolution as a whole nor Harris's specific biblical allusion violated the federal establishment clause. Because the California Supreme Court has held that the state establishment clause is not to be construed more broadly than the federal establishment clause, we further conclude that these acts did not violate the state establishment clause. We thus affirm the trial court's ruling on Rodriguez's fourth and fifth causes of action.

4. Equal Protection

Rodriguez alleges that defendants violated his right to equal protection "inasmuch as Defendants treated females accused of inappropriate conduct differently than Plaintiff, used religious references against Plaintiff that would never have been and could not have been legally used against a female employee, and imposed standards of scrutiny against Plaintiff that were not provided for by law." He seeks injunctive, declaratory, and mandamus remedies.[9] On appeal, he explains that his equal protection claims are based primarily upon two factual scenarios: (1) the Board investigated the complaints of sexual harassment against him but did not investigate a complaint of sexual harassment against a female employee of JUSD; and (2) defendants' alleged failure to investigate his complaint about the circulation among Board members of an off-color comical photograph of former President Bill Clinton and Hillary Clinton. He further contends that Harris and Duchon "treated [him] differently than themselves in regards to being represented by an attorney during the sexual harassment investigation."[10] As we explain

[9] Rodriguez does not seek, nor could he obtain, money damages for the alleged violation of his California constitutional right to equal protection. (See *Gates v. Superior Court* (1995) 32 Cal.App.4th 481, 516, 525; *Javor v. Taggart* (2002) 98 Cal.App.4th 795, 807.)

[10] In his complaint, Rodriguez alleges additional facts in support of his equal protection claims. He alleges, for example, that he is "the subject of invidious discrimination because of his ethnic origin, race, creed, and other immutable characteristics under law." Because he does not assert or support these allegations on appeal, we do not consider them. (See *Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1754, fn. 1 [points not presented in opening brief are deemed abandoned or waived].)

below, Rodriguez has failed to satisfy his burden of showing a probability of success on these claims.

Our state and federal Constitutions prohibit the state from denying any person equal protection of the laws. (U.S. Const., 14th Amend., § 1; Cal. Const., art. 1, § 7, subd. (a).) The essence of equal protection is that persons who are similarly situated with respect to the legitimate purpose of the law receive like treatment. (*City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 439; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) "Equal protection challenges typically involve claims of discrimination against an identifiable class or group of persons. The United States Supreme Court in *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564 . . . , however, held that a plaintiff who does not allege membership in a class or group may state a claim as a '"class of one."' [Citation.]" (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 857.) A "'class of one' equal protection claim is sufficient if the plaintiff alleges that (1) the plaintiff was treated differently from other similarly situated persons, (2) the difference in treatment was intentional, and (3) there was no rational basis for the difference in treatment." (*Id.* at p. 858; see also *Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 605.)

"The rational basis test is extremely deferential and does not allow inquiry into the wisdom of government action. [Citation.] A court must reject an equal protection challenge to government action 'if there is any reasonably conceivable state of facts that

could provide a rational basis for the [difference in treatment]. [Citations.]' [Citations.] 'Where there are "plausible reasons" for [the] action, "our inquiry is at an end." [Citation.]' [Citation.] Under the rational basis test, courts must presume the constitutionality of government action if it is plausible that there were legitimate reasons for the action. In other words, the plaintiff must show that the difference in treatment was '"so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational."' [Citation.] Proving the absence of a rational basis can be an exceedingly difficult task. In some circumstances involving complex discretionary decisions, the burden may be insurmountable." (*Las Lomas Land Co., LLC v. City of Los Angeles, supra,* 177 Cal.App.4th at pp. 858-859.)

Rodriguez's claim that the Board failed to investigate a complaint of sexual harassment made against one of his female accusers is based upon a written complaint made by someone whose name is redacted from the copy in our record. The complainant states that the alleged female harasser "made inappropriate physical contact with" the complainant; specifically: "She approached me and stood in close physical proximity to me, making me uncomfortable. She then grabbed my hand and held it, against my wishes and without my consent. I was compelled to excuse myself in order to disengage from her unwanted touching. She has also hugged me." The accused also allegedly "made inappropriate remarks in the past. For example, in our first meeting she told me that she was separated from her husband and that we should do lunch sometime. I politely said

no thank you. I pulled out the pictures of my family in my wallet, and said what are we here to talk about? She said she just wanted to touch bases with me." According to Rodriguez, this complaint was never investigated.

Even if we assume Rodriguez's assertion that he and the other alleged harasser are both agents and representatives of JUSD subject to the same sexual harassment policies, the nature of the complaints against Rodriguez—which involved numerous acts of alleged harassing conduct directed at four different women—is clearly of a more serious nature than the conduct asserted against the female alleged harasser. In light of the deference we must attribute to JUSD's decision to investigate Rodriguez and to not investigate the other complaint, we conclude Rodriguez has failed to satisfy his burden of showing a probability of success on this claim.

Rodriguez's claim that defendants treated him differently by failing to investigate an alleged "overt sexual harassment/hostile work environment" is based upon the distribution to Board members of a photograph of former President Clinton and Hillary Clinton. The photograph shows the former President appearing to help a dog stand on its hind legs; the dog's nose is near former President Clinton's waist; Mrs. Clinton is looking at the dog; above her, a word bubble is overlaid to make it appear that she is saying the words, "Let's name her Monica." Rodriguez asserts that he called for an investigation regarding the photograph, but nothing was done. Such evidence does not support an equal protection violation. Neither the evidence nor Rodriguez's argument indicates how he was similarly situated to whoever it was that distributed the photograph. Moreover,

the distribution of the comical photograph is patently dissimilar to the allegations made against Rodriguez of inappropriate physical contact with, and sexually suggestive comments directed against, four women. There thus appears to be a rational basis for treating Rodriguez and the distributor of the photograph differently.

Finally, Rodriguez claims he was treated differently from defendants in that JUSD "unilaterally and arbitrarily terminated" his counsel but continued to provide counsel for themselves. The claim is without merit. First, as noted above, JUSD never *terminated* Rodriguez's attorney; at most, it stopped paying for his attorney's work once JUSD considered the investigation complete. Second, paying the Board's own attorney fees and discontinuing payment of Rodriguez's attorney fees does not violate equal protection because the parties are not similarly situated: Rodriguez was being investigated for sexual harassment, the other Board members were not. Rodriguez has therefore failed to satisfy his burden of showing a probability of success on his equal protection claim.

5. Section 1983

In his third cause of action, Rodriguez alleges that defendants deprived him of "his due process and political rights . . . as secured by the Fourteenth Amendment to the United States Constitution. The actions alleged in the complaint, he asserts, were the result of the adoption of a policy by defendants instituted against him for the purpose of violating his constitutional rights. On appeal, Rodriguez presents no specific argument as to his § 1983 claim. Indeed, he refers to § 1983 only once, when he lists the causes of action asserted in his complaint. The failure to address the claim independently of his

constitutional claims appears to be an acknowledgement that "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" (*Albright v. Oliver* (1994) 510 U.S. 266, 271, quoting *Baker v. McCollan* (1979) 443 U.S. 137, 144, fn. 3; accord, *County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 297.) Because we hold he has failed to establish a probability of prevailing as to his constitutional claims, he has also failed to satisfy his burden of establishing a probability of prevailing as to his § 1983 claim.[11]

IV. DISPOSITION

The judgment and orders appealed from are affirmed.

Rodriguez shall pay defendants' costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Ramirez
P.J.

/s/ Miller
J.

[11] Because we hold that Rodriguez has failed to establish a probability of prevailing on the merits of his underlying constitutional claims (and therefore his § 1983 claim), we do not decide whether defendants are persons subject to suit under § 1983.